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*Attorneys for Defendant
Novartis Pharmaceuticals Corporation*

In Re Zometa/Aredia Litigation

FILED
JAN 08 2010
JUDGE JESSICA R. MAYER

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – MIDDLESEX COUNTY

CIVIL ACTION
In Re Zometa/Aredia Litigation
CASE NO. 278 MT

APPLICABLE TO:
All Cases

**ORDER GRANTING NOVARTIS
PHARMACEUTICALS
CORPORATION'S MOTION FOR A
PROTECTIVE ORDER PURSUANT TO
R. 4:10-2(g) and R. 4:10-3**

THIS MATTER having been opened to the Court by defendant Novartis Pharmaceuticals Corporation ("NPC") by and through its counsel, Sils Cummis & Gross P.C. and Hollingsworth LLP, for an Order granting NPC's motion for a Protective Order pursuant to R. 4:10-2(g) and R. 4:10-3 to preclude plaintiffs from taking the depositions of Mr. David Epstein, President and CEO of Novartis Oncology and Novartis Molecular Diagnostics, NPC, and Dr. Rainer Boehm, Executive Vice President of NPC and the Head of the North

1/8/10

Waken #5 - 711 through

472

(see attached list)

America Region, Oncology Business Unit, and the Court having considered the submissions of the parties and ~~having heard the arguments of counsel on~~, and for other good cause shown;

IT IS on this 8th day of January 2010;

ORDERED that defendant NPC's motion for a Protective Order pursuant to R. 4:10-2(g) and R. 4:10-3 be and hereby is granted, the Court having found that NPC need not produce Mr. David Epstein, President and CEO of Novartis Oncology and Novartis Molecular Diagnostics, NPC, or Dr. Rainer Boehm, Executive Vice President of PNC and the Head of the North America Region, Oncology Business Unit for deposition; and it is further

ORDERED that a copy of this Order shall be served on all counsel of record within seven (7) days of its receipt by counsel for NPC.


HONORABLE JESSICA R. MAYER

This motion was:

☒ Opposed

☐ Unopposed

OPPOSED

* Denied for the reasons set forth in the written memorandum dated Jan. 8, 2010. Dr. Boehm and Mr. Epstein shall be produced for depositions no later than January 29, 2010. The documents requested in plaintiffs' deposition notices directed to these individuals shall produced no later than January 15, 2010.

Zometa / Aredia
December 16, 2009
Current Case Count
159

Docket	Case	Filing Date
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Judge Jessica R. Mayer Team 4

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SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
JESSICA R. MAYER, J.S.C.



MIDDLESEX COUNTY COURTHOUSE
P.O. BOX 964
NEW BRUNSWICK, NEW JERSEY 08903-964

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Memorandum of Decision on Defendant's Motion for A Protective Order

In re: Aredia and Zometa, Case No. 278MT
(Applicable to all pending cases – Motions Numbers 711-972)

For Defendant: Beth S. Rose, Esq. for Novartis Pharmaceuticals Corporation

For Plaintiffs: Michael L. Rosenberg, Esq.

Dated: January 8, 2010

Background

This is a products liability mass tort litigation involving over 150 plaintiffs and Defendant Novartis Pharmaceuticals Corporation ("NPC" or "Defendant"). All of the plaintiffs in this litigation allege that they developed osteonecrosis of the jaw ("ONJ") after taking Zometa® or Aredia®, drugs manufactured by NPC. Pretrial discovery has been ongoing in the Federal Court Multi-District Litigation involving Zometa® and Aredia® (the "MDL") and the New Jersey matters. According to Defendant, approximately 63 current/former employees have been produced for deposition on behalf of NPC in the MDL and the New Jersey litigations.

Defendant filed a motion seeking a protective order in response to plaintiffs' notices to take the depositions of two specific NPC employees, Dr. Rainer Boehm and Mr. David Epstein. Dr. Boehm, currently employed by NPC, is Executive Vice President and head of Defendant's North American Region Oncology Business Unit. Presently, Mr. Epstein is the Chief Executive Officer and President of Defendant's Oncology and Molecular Diagnostics. Notices to take the depositions of these two NPC employees were duly served by plaintiffs' counsel on or about August 19, 2009.

Despite being served with proper notices for depositions of these NPC employees, NPC did not produce Dr. Boehm or Mr. Epstein for deposition. The matter was raised during a case management conference before the Court conducted on November 17, 2009. At that conference, the court advised NPC's counsel that these NPC employees were to be produced for deposition or, in the alternative, NPC would be required to file a motion for a protective order barring the deposition of these employees. By the date of the next case management conference before the court, December 11, 2009, NPC had neither produced the two employees for deposition nor filed a motion for a protective order. Consequently, the Court required NPC to file a motion for a protective order no later than December 16, 2009. Plaintiffs' filed opposition to NPC's motion on December 30, 2009. NPC filed its reply papers on January 4, 2010.

NPC requested oral argument in connection with its pretrial discovery motion. Consistent with the requirements of Rule 1:6-2(c) and Rule 1:6-2(d), the court advised counsel for NPC that, because its motion was addressed to pretrial discovery, the matter would be disposed of on the papers without oral argument.

Defendant's Motion

The premise for NPC's motion is that Dr. Boehm and Mr. Epstein are "apex" employees of NPC and lack any unique or superior knowledge relevant to this litigation. Defendant contends that information relevant to plaintiffs' claims was provided via the deposition testimony of the 63 current/former employees of NPC conducted to date in the MDL and the New Jersey litigation. According to Defendant, the depositions of these two high-level NPC employees will result in cumulative information, given the hundreds of hours of deposition testimony from other NPC employees (past and present). NPC argues that the depositions of Dr. Boehm and Mr. Epstein are both duplicative and burdensome so as to require relief pursuant to Rule 4:10-2(b) and Rule 4:10-3.

Defendant argues that, under federal and state case law, Dr. Boehm and Mr. Epstein are high level executives and, therefore, should not be subject to unwarranted harassment or abuse by compelling cumulative deposition testimony. Defendant provides declarations from Dr. Boehm and Mr. Epstein purporting to limit their knowledge as neither individual has day-to-day involvement with ONJ activities relevant to plaintiffs' claims in this case.

Plaintiffs' Opposition

Plaintiffs highlight that the declarations filed by Dr. Boehm and Mr. Epstein in support of the motion for a protective order omitted any statement that either individual lacked knowledge or information "reasonably calculated to lead to the discovery of admissible evidence," as that is the standard for the scope of discovery under Rule 4:10-2(a). Neither Dr. Boehm nor Mr. Epstein denied having knowledge about the marketing, production or sale of Zometa® and Aredia®. According to plaintiffs, Dr. Boehm and

Mr. Epstein are not “apex” employees of NPC as neither individual is the President of NPC, Chairman of the Board of NPC, or a similarly high-ranking executive.

Plaintiffs further argue that the deposition testimony of these employees is warranted as many of the current/former employees of NPC who have been deposed to date in the MDL and/or the New Jersey litigations had no recollection or knowledge of matters related to marketing and/or selling of Zometa/Aredia® in the face of the financial threat posed by ONJ. Therefore, plaintiffs believe the Dr. Boehm and Mr. Epstein have unique knowledge in this regard.

Lastly, plaintiffs argue that Defendant failed to substantiate any of the grounds for limiting discovery pursuant to Rule 4:10-2(g) or for issuing a protective order pursuant to Rule 4:10-3. Plaintiffs contend that Defendant failed, in the face of the many NPC employees who either expressed lack of knowledge or any information on specific subject matters, to prove that the deposition testimony of Dr. Boehm and Mr. Epstein would be cumulative or duplicative. According to plaintiffs, Defendant has not shown that plaintiffs had ample opportunity through discovery in either the MDL or the New Jersey litigations to obtain the information sought as neither Dr. Boehm nor Mr. Epstein have been deposed to date. Plaintiffs assert that Defendant failed to present evidence that the burden or expense associated with the deposition of these NPC employees outweighs the likely benefit to plaintiffs who seek to complete the puzzle with this testimony. Similarly, plaintiffs contend that Defendant failed to set forth “good cause” to protect these NPC employees from “annoyance, embarrassment, oppression or undue burden or expense,” consistent with the requirements of Rule 4:10-3.

Defendant's Reply

Defendant argues that Plaintiffs rely on an incorrect legal standard for compelling discovery from an “apex” employee. In accordance with case law, Defendants contend that plaintiffs must show Dr. Boehm and Mr. Epstein possess unique or superior personal knowledge of discoverable information to obtain the deposition testimony of these NPC executives. (Def. Br. at 3; Def. Reply Br. at 1). Defendant repeats its position that these individuals lack unique or superior knowledge in light of the 63 other NPC employees who have given several hundred hours of deposition testimony to date.

Legal Analysis

Defendant relies upon and cites federal case law and state law from other jurisdictions in support of its motion. Although the New Jersey Court Rule governing protective orders and limits upon the scope of discovery are similar to the Federal Court Rules, the New Jersey Court Rules and decisional law afford wide latitude in favor of liberal discovery as to any matter, not privileged, that is relevant to the subject matter. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987).

Defendant cites several cases from the State of Texas in support of the motion for a protective order. Those cases include In re Taylor, 2009 WL 2568375 (Tex. App. August 20, 2009); In re Burlington N. and Santa Fe Ry. Co., 99 S.W.3d 323 (Tex. App. 2003); In re Daisy Mfg. Co., Inc., 17 S.W.3d 654 (Tex. 2000); In re Acatel U.S.A., Inc., 11 S.W.3d 173 (Tex. 2000); and AMR Corp. v. Enlow, 926 S.W.2d 640 (Tex. App. 1996). States often decline to follow case law established in sister state courts. This issue seems to be such an example as New Jersey courts have declined to create a different standard for compelling discovery from a defendant’s “apex” employee or high-

ranking corporate executive. New Jersey courts have not adopted the reasoning of sister jurisdictions that concludes high-ranking or “apex” employees of a defendant need only respond to discovery requests where a plaintiff is able to demonstrate that the high-ranking employee has unique or superior personal knowledge on the subject matter.

Notably absent from Defendant’s briefs are cases relying on New Jersey law on this very issue. Presumably, New Jersey judges in both state and federal courts are aware of those jurisdictions that have adopted the “apex” employee status in connection with discovery requests directed to high-ranking corporate executives. Yet, Defendant cited a single case wherein a federal court judge in New Jersey denied the defendant’s motion for a protective order “recognize[ing] that there is not a protective blanket that prohibits discovery from highly placed executives.” Otsuka Pharm. Co., Ltd. V. Apotex Corp., 2008 U.S. Dist. Lexis 73515 (D.N.J. September 25, 2008) (litigation involving an alleged patent infringement), motion denied by Otsuka Pharm. Co., Ltd. V. Barr Labs, Inc., 2008 U.S. Dist. Lexis 99214 (D.N.J. December 5, 2008) (citation omitted).

Based upon the information presented to the court in Otsuka, the federal judge concluded that the high-level executive seeking a protective order had unique knowledge that other defense witnesses produced in response to corporate designee deposition notices were unable to provide. The same is true in this case. Based upon the information set forth in plaintiff’s certification and brief in opposition to the motion, other defense witnesses who were deposed in the MDL and New Jersey litigations were unable to respond to matters as to which Dr. Boehm and Mr. Epstein have unique personal knowledge. (Pls. Opp. at 6; Rosenberg Cert., Ex. 4-7 and Ex. 10-13). That other NPC witnesses during their deposition testimony failed to specify that such unique

knowledge was possessed by Dr. Boehm and/or Mr. Epstein does not equate with a lack of unique or superior knowledge on the part of Dr. Boehm and Mr. Epstein.

The New Jersey state court cases cited by Defendant in support of its motion are distinguishable. In Hyland v. Smollok, 137 N.J. Super. 456 (App. Div. 1975), the court held that high-level governmental officials, as distinguished from employees of a named defendant, should not be deposed absent first-hand knowledge. In Hyland, the motion judge, in connection with the denial of a motion for summary judgment, ordered that the State's Attorney General, the Director of the Division of Criminal Justice, and a deputy attorney general be deposed. Id. at 458. On appeal, the appellate court reversed the trial court and directed entry of judgment in favor of plaintiff, thereby rendering unnecessary the trial court's order compelling the depositions of these governmental officials. Id. at 463.

In Berrie v. Berrie, 188 N.J. Super. 274 (Ch. Div. 1983), the court held that the divorcing husband was not entitled to discovery of a non-party (the divorcing husband's estranged brother who operated a competing toy/novelty business in California) that involved a different controversy (non-divorce action), different parties and different considerations. The family court judge held that there were "other means for proving the value of plaintiff's business interests without any unwelcome intrusion being visited upon non-parties." Id. at 287.

In Catalpa Investment Group, Inc. v. Franklin Twp., 254 N.J. Super. 270 (Law. Div. 1991), Judge Arnold issued a protective order quashing discovery requests directed to members of the township's zoning board in a prerogative writs action. The plaintiff in that case sought discovery from members of the zoning board of adjustment who denied

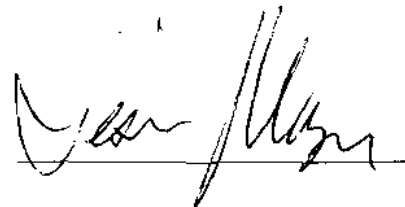
the plaintiff's requested variance relief. Id. at 272. Judge Arnold held that, because an action in lieu of prerogative writs challenging the denial of a requested variance was based on the record below, discovery as to the thought processes of the board members, in the form of written interrogatories and/or deposition testimony, was oppressive. Id. at 275. Moreover, as members of a municipality's zoning board are volunteers, the court found that compelling such discovery would serve to discourage citizens from accepting a position on a volunteer board. Ibid.

In this case, discovery is not limited to a record before a reviewing agency such as a zoning board or planning board. Nor does this action involve divorcing parties who are attempting to value a business through discovery of a non-party. The only arguable basis for requesting a protective order on behalf of these defendants is the burden it will place on these particular individuals whose time is valuable to NPC.

If Dr. Boehm and Mr. Epstein have no specific knowledge or information reasonably calculated to lead to the discovery of admissible evidence, other than familiarity with general business decisions and corporate formalities, then the court predicts that the deposition of each will be completed in a relatively short period of time, thereby limiting any burdensome intrusion on their time.

Conclusion

For the foregoing reasons, NPC's motion for a protective order regarding the depositions of Dr. Boehm and Mr. Epstein is denied. Dr. Boehm and Mr. Epstein shall be produced for their deposition no later than January 29, 2010 and the documents requested pursuant to plaintiffs' deposition notices for these individuals shall be produced no later than January 15, 2010. The court shall enter an order accordingly.

A handwritten signature in black ink, appearing to read 'Jessica R. Mayer', is written over a horizontal line.

Jessica R. Mayer, J.S.C.